Supreme Court, U.S.
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No. 08-666

IN THE

Supreme Court of the United States

SEAN QUINN,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF THE PETITIONER SEAN QUINN

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QUESTION PRESENTED

1. Should certiorari be granted to determine whether the failure of the State of New Jersey to require the videotaping of field sobriety tests in cases of driving while under the influence violates the Due Process Clause of the Fourteenth Amendment?

LIST OF PARTIES

The parties to this matter are the following:

The Morris County Prosecutor
Admin. & Records Bldg.
Morristown, NJ 07963-0900

Attorney General's Office
Appellate Bureau
P.O. Box 086
Trenton, NJ 08625

CORPORATE DISCLOSURE STATEMENT

This case involves an individual and does not involve any privately held corporations.

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The opinion of the New Jersey Superior Court, Appellate Division (dated May 2, 2008), is unreported in A.2d but available at 2008 WL 1913041 (N.J.Super.A.D.) On July 3, 2008, the New Jersey Supreme Court denied Certification at *State v. Quinn*, 196 N.J. 343, 953 A.2d 762 (2008) (Opinion annexed at Pal-2).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257, and Supreme Court Rule 10(c), since a State Court has decided an important question of federal law (due process) which should be settled by this Court. The New Jersey Supreme Court denied the Petition for Certification on July 30, 2008, and the initial petition was filed on September 26, 2008, within the 90 day requirement of Rule 13.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A) PROCEDURAL HISTORY

On March 3, 2006, the petitioner Sean Quinn was charged in Butler Township, New Jersey, with driving while under the influence of alcohol (DUI), contrary to N.J.S.A. 39:4-50; reckless driving, contrary to N.J.S.A. 39:4-96; failure to maintain lane, contrary to N.J.S.A. 39:4-88b; failure to wear a seatbelt, contrary to N.J.S.A. 39:3-76.2F; and failure to inspect, contrary to N.J.S.A. 39:8-1.

Petitioner was tried in the Butler Municipal Court on September 6, 2006, and October 4, 2006, before the Honorable George A. Cluff, J.M.C. After finding that the State had violated a sequestration order, (1T*124 to 6), and barring the testimony of Sergeant Chimento, who had conducted the field sobriety tests, Judge Cluff found the petitioner guilty of driving while under the influence and imposed a two year revocation of the petitioner's license and registration, with sundry fines and surcharges.

The sentence was stayed pending appeal. (2T75-19 to 19).

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* "1T" denotes municipal transcript dated September 6, 2006.
"2T" denotes municipal transcript argument dated October 4, 2006.
"3T" denotes transcript of municipal appeal dated January 27, 2006.

The petitioner filed a timely appeal in the Superior Court of New Jersey, Law Division. Following oral argument on January 26, 2007, before the Honorable Salem Vincent Ahto, P.J.Cr. (New Jersey Superior Court, Law Division, Morris County Vicinage, Criminal Part), Judge Ahto found the petitioner guilty de novo of driving while under the influence and imposed the same sentence. Judge Ahto stayed imposition of the sentence to allow the petitioner to move before the Appellate Division for a stay.

A Notice of Appeal was filed. On April 24, 2007, the Appellate Division granted a motion for a stay pending appeal. On May 2, 2008, the New Jersey Superior Court, Appellate Division, affirmed Judge Ahto. The New Jersey Supreme Court denied the Petition for Certification on July 3, 2008.

On September 24, 2008, the petitioner appeared in the Butler Municipal Court before the Honorable John A. Paparazzo, J.M.C., for imposition of the original sentence and at that time the petitioner filed a "Notice of Motion for a Continued Stay of the 2-Year Suspension of Driving Privileges." On September 24, 2008, Judge Paparazzo issued an Order denying the motion for a stay.

On September 23, 2008, the petitioner forwarded to the United States Supreme Court a Petition for a Writ of Certiorari, which was filed on September 26, 2008. The Clerk's Office by way of letter dated September 26, 2008, advised of certain deficiencies which had to be corrected in the petition. Petitioner has now resubmitted the petition.

B) STATEMENT OF FACTS

On March 3, 2006, at approximately 12:11 a.m., Butler Police Officer Keith Soules was on patrol in an unmarked patrol vehicle on Route 23 North in Butler. It was snowing and "just starting to get snow covered." (1T13-10 to 14-21). On cross-examination, Officer Soules testified that it had started snowing around 7:00 p.m. (1T47-1 to 3). The road was "wet and snowy and icy"; as reflected by Soules' markings on the summonses. (1T50-3 to 6; Dal-3).

Officer Soules observed a white Mazda (MX6) whose owner threw a piece of cellophane out of the moon roof. (1T15-21 to 22). Officer Soules began following the vehicle, and observed the Mazda "crossing over the...dotted white several times." (1T16-8 to 18-22). Officer Soules pulled up alongside the Mazda and noticed that the driver (the petitioner) was not wearing his seatbelt. (1T21-11 to 25).

Officer Soules activated his lights and the petitioner's vehicle pulled over, but not before crossing "the solid white line and the dotted white line." (1T22-15 to 23-8). The petitioner's vehicle was pulled over in West Milford. (1T23-10 to 24-3).

Upon speaking with the petitioner, Officer Soules detected "a strong odor of an alcoholic beverage on his breath." (1T24-5 to 9). Officer Soules testified that the petitioner was "having a hard time speaking." (1T24-22 to 25). The petitioner "was actually stuttering." (1T25-1 to 3). Officer Soules, who had never before met the petitioner, did not know if this was the petitioner's normal manner of speaking. (1T25-8 to 14).

The petitioner was asked for his driving credentials, and the petitioner "looked through his wallet and through his vehicle... extensively before finding his documents." (1T25-17 to 26-24). The petitioner did produce his license, registration and insurance card. (1T26-15 to 17). Nothing in Officer Soules' report indicates that the petitioner had "any fumbling hand movements" or any difficulty in getting this documentation. (1T58-25 to 59-12).

Officer Soules testified that the petitioner's "eyes seemed very bloodshot." (1T27-8 to 9). The petitioner was asked by Officer Soules whether he had been drinking, and the petitioner denied that he had been drinking. (1T27-6 to 17).

Sergeant Chimento arrived at the scene; the petitioner was still in his vehicle. (1T27-18 to 28-6). Sergeant Chimento asked the petitioner to step out of the vehicle. As the petitioner attempted to exit his vehicle, he "grabbed onto his door and his roof for support." (1T28-13 to 29-6). The petitioner submits that the Mazda MX6 that he was driving is so low that it is impossible to exit the vehicle without grabbing the car's door and roof to do so. The petitioner moved to the front of the vehicle, accompanied by Sergeant Chimento, who asked the petitioner to perform the field sobriety tests. (1T29-7 to 30-13).

Sergeant Chimento conducted the field sobriety tests, and Officer Soules witnessed him giving these tests. (1T31-6 to 22). The first test that Sergeant Chimento asked the petitioner to perform was the "horizontal gaze nystagmus test." (1T31-23 to 32-1).

The second test was that Sergeant Chimento asked petitioner to recite the alphabet. (1T32-2 to 4). Officer Soules testified, after refreshing his recollection with his police report, that the petitioner "stopped at the letter P and also stopped at the letter W and he, he did indeed never finish the test. Um, the whole time he was doing it he was stuttering and, and slurring." (1T34-9 to 15).

On cross-examination, Soules testified that the petitioner made it all the way to the letter "P," and then stopped again at the letter "W," missing only the letters "X, Y and Z." (1T65-7 to 18).

Officer Soules testified that the petitioner, when he was doing the horizontal gaze nystagmus test, "was swaying back and forth, he was moving in circles. He kept reaching to grab for something for support." (1T35-25 to 36-5).

Officer Soules then arrested the petitioner, read him his Miranda rights, and transported him back to police headquarters. (1T36-8 to 12). Once at headquarters, the petitioner was read the "Implied Consent Form" and he agreed to take the breathalyzer—the Alcotest. (1T36-19 to 37-4). Except for the Alcotest, no other tests (dexterity or chemical) were administered at headquarters. (1T37-5 to 8). The Alcotest results were not utilized by the State at trial, since at the time of trial the validity of the Alcotest was in doubt.

According to Officer Soules, the petitioner "was having a hard time every time he stood up. Having a hard time following orders. He'd be very antagonistic to this officer." (1T40-14 to 16). The petitioner called the officers "names and, um, stuff like, just um, little things like that." (1T40-21 to 22). Officer Soules opined that the petitioner "was very intoxicated." (1T43-8 to 10).

Officer Soules admitted that he is familiar with the "finger dexterity test"—this consists of asking the subject to count from one to four on their hand, touching each finger with his or her thumb. (1T62-19 to 63-8). This field dexterity test was not administered to the petitioner, but could have been administered to the him, as admitted to by Officer Soules. (1T63-7 to 10).

Officer Soules admitted that he had heard of the test whereby suspects are asked to count backwards from 100 to 70; but he never administered this test. (1T63-15 to 64-14).

Officer Soules was familiar with the "walk-and-turn" test, (1T65-19 to 68-2); and with the "one-leg stand" test to determine sobriety. (1T66-4 to 10). The petitioner was not given any finger test, counting backwards test, heel-to-toe test, or one-leg stand test. (1T67-7 to 17).

In addition to the testimony of Officer Soules, the State presented the testimony of Sergeant Ciro Chimento, who administered the field dexterity tests to the petitioner. As stated previously, the entire testimony of Sergeant Chimento was ordered stricken by the municipal judge due to a discovery violation. (2T71-5 to 8).

C) THE MUNICIPAL JUDGE'S DECISION

As explained above, Judge Cluff excluded the testimony of Sergeant Chimento due to a violation of the sequestration order. However, Judge Cluff found the petitioner guilty of DUI beyond a reasonable doubt:

> I uh, I realize that there was no uh, uh, test offered regarding the Alcotest. However, and I, and I agree, in part with Mr. Kelly's statement that the, that the uh, Court should consider that. However, based on the testimony of Officer Soules alone, his observations of the defendant driving his vehicle, uh, with the uh, with the uh, sunroof or moon roof, or whatever it is open, throwing something from it and then continuing to drive along with this open, in cold and inclement weather, weaving from lane to lane on numerous occasions, the officer estimated ten times with no signals, uh, certainly was reason to stop the car, and uh, Officer Soules' observations of uh, of the defendant, Mr. Quinn, after stopping the vehicle was such that uh, he had a strong odor of alcohol, bloodshot and watery eyes, extremely slurred speech. When exiting his vehicle, he had to hold on to the vehicle for balance, could not recite the alphabet properly.

> All of these things are uh, in the Court's judgment, proof that uh, Mr. Quinn had too much to drink, in violation of the statute. And I uh, his admission of drinking, ultimately, his first his denial and then subsequently his admission of drinking uh, is also proof of his intoxication.
>
> I must find him guilty of a violation. I obviously, the State has not proven the greater violation, but I am going to find him guilty with regard to the uh...the D.W.I. and the three month revocation. (2T71-11 to 72-13).

D) THE LAW DIVISION JUDGE'S DECISION

Judge Ahto acknowledged that, concerning the field dexterity tests:

> Well, you had the alphabet test, but you didn't have the finger dexterity tests, that's one of the things Mr. Kelly brought out in cross-examination. You didn't have the count backwards test, say, from 100 to 70 or 70— whatever it might have been. That's something you normally get. And he really didn't do the heel to toe test. (2T10-23 to 11-5)

Interestingly, Judge Ahto, when commenting on the alphabet test, stated: "Well, I guess you could be a Rhodes Scholar not (sic) know the balance beyond A, B, C, D, E, or F, you might not use it during the course of your life." (2T12-1 to 4).

Judge Ahto found that Officer Soules testified that at 10:00 p.m. on March 3, 2006 it had started to snow. (2T13-6 to 7). Officer Soules observed the petitioner throw what looked like cellophane out of the moon roof of his vehicle. (2T13-16 to 24). Officer Soules observed the petitioner's vehicle "cross over the dotted white line several times." (2T14-8 to 9).

Judge Ahto found that after pulling petitioner's vehicle over and approaching the petitioner (who was driving), Officer Soules "detected a strong odor of an alcoholic beverage on the petitioner's breath." (2T15-12 to 13). Judge Ahto found that the petitioner "was slurring his words. He was actually stuttering." (2T15-16). Judge Ahto found that the petitioner had a difficult time locating his driving documents. (2T15-17 to 16-5).

Judge Ahto stated:

> The officer noted that his eyes were very bloodshot. The odor of alcohol was indeed on his breath, and he, the officer, was of the view that Mr. Quinn, the defendant, had been drinking, so he asked him. He asked him if he had been drinking. And the defendant responded he had not been drinking.
>
> At some point Sergeant Chimento arrived and after Sergeant Chimento, Mr. Quinn stepped out of his vehicle.

But when he stepped out of his vehicle, he was still in sight of Officer Zulis (sic), who noticed when Mr. Quinn got out he was grabbing onto the door, he was grabbing onto the roof, and he was grabbing these things for the purpose of supporting himself.

With respect to field sobriety tests, he indicated, that's Officer Zulis (sic), he was about two feet away when Officer Chimento was giving certain instructions to Mr. Quinn with respect to the performance of those tests. And it's not unusual for instructions to be given in addition to demonstrations. But he started out with a non-neurological, or physical test.

Do you know the alphabet test. And Mr. Quinn was asked to perform the alphabet test. Aside from the difficulty that Mr. Quinn was having in speaking, Officer Zulis (sic) observed that he dropped a couple of times and he never really finished the alphabet test. So whether he went to the letter W, or whether he stopped at the letter P, he just never finished the test. And during the time that he was, he was stuttering, he was slurring.

Now, this was a dark area, and there were no street lights. And even though there were headlights on from the vehicles, there wasn't a great deal of lights, other than that being illuminated from the headlights, or maybe even the take-down lights of Chimento's vehicle.

They observed - I should say Mr. Zulis (sic) observed, however, Mr. Quinn as there was certainly enough illumination to do that. Mr. Quinn was having a difficult time standing. And in light of everything they saw, the police discontinued the attempt to have him do tests. He couldn't stand. He was swaying back and forth. He was moving in circles. He was reaching to grab something to support himself. He was arrested. When he was brought back to headquarters he was asked to sign and read the implied consent form.

Now, it is true that the finger test, the finger dexterity test, thumb to pinkie and so on was not conducted. It is true that there was no counting backwards from say 100 to any number, or from any number to another number. It is true that there was no heel to toe test performed. And it is true that there was no one-leg stand test.

As to the latter tests, the reason really essentially given was that he couldn't stand without support. (2T16-6 to 18-11).

Judge Ahto concluded:

> I'm satisfied that the State has met its burden beyond a reasonable doubt. The conduct at the headquarters, even if this was a close call, and I don't find it to be, the conduct at the headquarters whereby the ambulance squad had to be called in and the defendant taken to the hospital because of his conduct, which is something I—I'm almost willing to assume that doesn't occur regularly with Mr. Quinn, really shows that he had lost the clearness of his intellection (sic) and control, and that his mental faculties had been disturbed, as does his lack of coordination, the inability to stand, and those other things that I have found, because I do accept those statements and the testimony of Mr. Zulis (sic), as obviously the Municipal Court did, and as I've previously indicated in other cases while everybody's here based upon JOHNSON, LACURTO, CEREFICE. I should give due regard to the ability of—or I should give due deference to the ability of the Municipal Court Judge to assess the demeanor of the witnesses.
>
> So I'm satisfied he's guilty beyond a reasonable doubt. I'm sure this is not the Mr. Quinn that normally one would meet on a regular basis. And probably Mr. Quinn would be the first one to tell you that. (2T21-8 to 22-7).

E) APPELLATE DIVISION DECISION

Concerning the issue raised in this petition, the Appellate Division stated:

> We will only address briefly defendant's argument, not raised below, that the police should have videotaped him when conducting the field sobriety tests. This court has previously held that "[t]here is no duty on the part of the police to create evidence by videotaping suspected drunken drivers." State v. Gordon, 261 N.J. Super. 462, 464 (App. Div. 1993). Defendant, raising constitutional concerns, invites us to change this law. We decline to do so since nothing in defendant's argument or in State v. Cook, 179 N.J. 533, 551-62 (2004) warrants our consideration of this issue. 2008 WL 1913041 (N.J.Super.A.D.) (Pa3).

The petitioner first raised the issue concerning the need to videotape the dexterity tests in the Appellate Division.

REASONS FOR ALLOWANCE OF THE WRIT

The findings of fact by the municipal judge (Judge Cluff) and the Law Division de novo appeal judge (Judge Ahto) were stated in detail, supra, as these facts reveal the significance of petitioner's issue—namely, having a videotape of the field sobriety tests would ensure that judges trying these types of cases have actual visual proof of the suspect's performance on these tests.

Assuming for argument's sake that the field sobriety test given in this case (the alphabet test) is a reliable indicator of sobriety if administered properly, this test (along with the other observations) is still subject to a very subjective interpretative standard as to whether the individual exhibited signs of intoxication. For this reason, it is respectfully submitted that this Court should grant the petition for certiorari, exclude the results of the alphabet test, and rule that future field sobriety tests (showing the petitioner's appearance and demeanor) must be videotaped by the police.

In *Stephan v. State*, 711 P.2d 1156 (Alaska 1985), the Alaska Supreme Court held that the unexcused failure to record electronically an interrogation conducted in a place of detention violates the right to due process under the Alaska constitution. The court reasoned that a recording requirement would provide an objective means for evaluation of what occurred during an interrogation, protect the public's interest in honest and effective law enforcement, and protect the interests of police officers wrongfully accused of improper tactics. [Id. at 1161. The Court noted that compliance with the recording requirement would not be unduly burdensome as many places of detention already had working recording devices. Noting that in the cases before the court the police had recorded portions of the questioning, the court reasoned, "turning the recorder on a few minutes earlier entails minimal cost and effort." Id at 1162.

The Minnesota Supreme Court imposed a recording requirement in *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), although not on the basis of a due process requirement.

The Minnesota Supreme Court declined to make a determination on whether a criminal suspect has a right to have his interrogation recorded under the Minnesota Constitution. Relying instead on its supervisory power, the Court held that all custodial interrogations, including any information about rights, waiver of those rights, and all questioning, must be recorded electronically when feasible and whenever questioning occurs at a place of detention. The Court observed that many factual disputes about the denial of a defendant's constitutional rights would be avoided if all conversations between the police and a suspect were recorded. Id. at 591.

The New Jersey Supreme Court has frequently resorted to the New Jersey Constitution in an effort to afford its citizens broader protection of certain personal rights than that afforded by analogous or identical provisions of the Federal Constitution. *See State v. William*, 93 N.J. 39 (1983); *State v. Novembrino*, 105 N.J. 95, 144-145 (1987); *State v. Saez*, 268 N.J. Super. 250, 260-61 (App. Div. 1993). In *State v. Cook*, 179 N.J. 533, 562 (2004), the New Jersey Supreme Court established a committee to study and submit recommendations on the use of electronic recording of custodial interrogations.

In *Quinn*, petitioner urges this Court to extend the protection offered by the New Jersey Constitution and hold that the failure to videotape record a defendant's field sobriety tests violates notions of Due Process as they have been defined in the New Jersey Constitution.

It should be noted that in *Cook*, *supra*, the Court exercised its supervisory authority to establish a committee to study and make recommendations on use of electronic recordation of custodial interrogations.

On October 14, 2005, the New Jersey Supreme Court adopted the recommendations of its Special Committee on the Recordation of Custodial Interrogations. The recommendations included a requirement that police electronically record the entirety of all custodial interrogations occurring in a place of detention for cases in which the adult or juvenile being interrogated is charged with an offense requiring the use of a warrant pursuant to *R.* 3:3-ic.

On January 17, 2006, the Attorney General issued Directive No. 2006-2, which mandated the electronic recordation of all custodial interrogations conducted in a place of detention for all first, second and third degree crimes, for adult and juvenile suspects alike. (Attorney General Directive 2006-4, dated October 10, 2006).

For the foregoing reasons, the alphabet test results should be stricken. Additionally, since no videotape was made of the petitioner's behavior, the conviction should be reversed.

CONCLUSION

For the foregoing reasons and authorities cited, the petitioner Sean Quinn respectfully submits that this Court should grant certiorari as the failure to videotape field sobriety tests violates the petitioner's Fourteenth Amendment due process right to a fair trial.

Respectfully submitted,

Dated: November 7, 2008

John Vincent Saykanic
Attorney for Petitioner
Sean Quinn

APPENDIX

Not Reported in A.2d, 2008 WL 1913041 (N.J.Super.A.D.)

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division,
STATE of New Jersey, Plaintiff-Respondent,
v.
Sean QUINN, Defendant-Appellant.
Argued April 22, 2008.
Decided May 2, 2008.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Municipal Appeal No. 06-044.
John Vincent Saykanic, argued the cause for appellant.

Erin Smith Wisloff, Assistant Prosecutor, argued the cause for respondent (Robert A. Bianchi, Morris County Prosecutor, attorney; Ms. Wisloff, on the brief).

Before Judges Grall and Chambers.

PER CURIAM.

*1 Defendant Sean Quinn appeals from his conviction for driving while under the influence of alcohol in violation of *N.J.S.A.* 39:4-50. We affirm substantially for the reasons set forth by the Law Division judge in his oral decision.

Defendant was stopped on March 3, 2006, by Police Officer Keith Soules of the Borough of Butler who had seen defendant weaving across the dotted white line in the road a number of times. Sergeant Ciro Chimento was called to the scene to conduct field sobriety tests. The field tests were not completed because defendant was having difficulty standing. Defendant was arrested and taken to the police station where an Alcotest was conducted.

At the time of the municipal court hearings on September 6 and October 4, 2006, the admissibility of the Alcotest results were still in question, since State v. Chun, 194 N.J. 54 (2008), was then pending but had not yet been decided. As a result, the State proceeded without introducing the Alcotest results. Further, due to the violation of a sequestration order, the testimony of Sergeant Chimento was excluded from the record. Defendant did not testify nor present evidence. Thus, the record consists solely of the testimony of Officer Soules and his observations of defendant on the evening in question.

Officer Soules testified that defendant was "very intoxicated." Defendant had a strong odor of alcohol; his eyes were bloodshot; his speech was slurred and stuttering; he had to grab onto the door and roof of the car when he exited the vehicle; he had difficulty standing; he could not recite the entire alphabet; and he was walking in circles and was swaying. At the police station, defendant also became antagonistic and made suicidal statements.

Based on these proofs, defendant was found guilty of driving while under the influence of alcohol. His license was suspended for two years; he was fined $500; and the other statutory penalties, surcharges and costs were imposed. Defendant appealed to the Law Division, and the conviction and sentence were upheld. This appeal followed. The implementation of the sentence has been stayed pending appeal.

On appeal defendant raises the following issues:

POINT I

THE DUI CONVICTION MUST BE REVERSED AND A JUDGMENT OF ACQUITTAL ENTERED SINCE THE STATE FAILED TO PROVE THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS; THE CONVICTION WAS BASED SOLELY UPON THE TESTIMONY OF OFFICER SOULES (WHO WAS NOT CERTIFIED TO PERFORM FIELD SOBRIETY TESTS)

POINT II

THE DUI CONVICTION MUST BE REVERSED AS THE CONVICTION IS BASED UPON HEARSAY EVIDENCE IN VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION (NOT RAISED BELOW)

POINT III

THE DEFENDANT'S DUI CONVICTION MUST BE REVERSED SINCE THE FIELD SOBRIETY TESTS THAT WERE GIVEN WERE NOT VIDEOTAPED (NOT RAISED BELOW)

We find that these issues are without sufficient merit to warrant discussion in a written opinion, Rule 2:11-3(e)(2), and affirmed for substantially the reasons set forth by the trial judge in his oral decision placed on the record on January 26, 2007.

*2 We will only address briefly defendant's argument, not raised below, that the police should have videotaped him when conducting the field sobriety tests. This court has previously held that "[t]here is no duty on the part of the police to create evidence by videotaping suspected drunken drivers." *State v. Gordon, 261 N.J.Super. 462, 464 (App. Div. 1993)*. Defendant, raising constitutional concerns, invites us to change the law. We decline to do so since nothing in defendant's argument or in *State v. Cook, 179 N.J. 533, 551-62 (2004)* warrants our consideration of this issue.

Affirmed.

N.J. Super. A.D., 2008.
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Not Reported in A.2d, 2008 WL 1913041 (N.J.Super.A.D.)

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No. 08-666

Supreme Court, U.S.
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v.

STATE OF NEW JERSEY

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the police violate due process by failing to videotape a field sobriety test administered as part of a driving while intoxicated investigation?

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OPINIONS BELOW

The May 2, 2008 opinion of the New Jersey Superior Court, Appellate Division is unreported but it is available at 2008 WL 1913041 (N.J. Super. App. Div.) (Pa1-3). The New Jersey Supreme Court denied Certification on July 3, 2008. State v. Quinn, 196 N.J. 343, 953 A.2d 762 (2008).

STATEMENT OF JURISDICTION

The judgment of the New Jersey Superior Court, Appellate Division was entered on May 2, 2008. (Pa1-2). The New Jersey Supreme Court denied the Petition for Certification on July 30, 2008. On September 26, 2008, the Petition for Certiorari was filed. The jurisdiction of this court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATUTORY PROVISIONS

N.J.S.A. 39:4-50 reads in pertinent part:

> (a)... a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.8% or more by weight of alcohol in the defendant's blood ... shall be subject:
> (2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to

> perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years... For a second violation, a person also shall be required to install an ignition interlock device under the provisions of P.L.1999, c. 417 (C.39:4-50.16 et al.) or shall have his registration plates revoked for two years under the provisions of subsection 2 or P.L.1995, c. 286 (C.39:3-40.1).

New Jersey Court Rule 3:23-8 reads, in pertinent part, as follows:

> "...In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the rights of the defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury...."

PROCEDURAL HISTORY

On March 3, 2006, petitioner Sean Quinn was charged in Butler Township, New Jersey, with driving under the influence of alcohol, in violation of N.J.S.A. 39:4-50; reckless driving, in violation of N.J.S.A. 39:4-96; failure to maintain lane, in violation of N.J.S.A. 39:4-88b; failure to wear a seatbelt, in violation of N.J.S.A. 39:3-76.2f; and failure to inspect, in violation of N.J.S.A. 39:8-1. A bench trial was held in the Municipal Court of the Boro of Butler before the Honorable

George A. Cluff, J.M.C. on September 6 and October 4, 2006[1]. Petitioner was found guilty of driving under the influence. He received a two-year license revocation and fines. The remainder of his charges were dismissed pursuant to merger. (2T75-13-15). This sentence was stayed pending appeal to the Superior Court, Law Division. (2T75:19). Petitioner appealed as of right to the Law Division. On January 6, 2007, the municipal appeal was heard before the Honorable Salem V. Ahto, J.S.C. On de novo review, Judge Ahto affirmed the conviction. R. 3:23-8. An appeal was filed. On May 2, 2008, the New Jersey Superior Court, Appellate Division, affirmed Judge Ahto's decision. State v. Sean Quinn , App. Div. Dkt. No. A-

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[1] 1T refers to the Municipal Court transcript of September 6, 2006

2T refers to the Municipal Court transcript of October 4, 2006.

3T refers to the Superior Court transcript of January 26, 2007.

3095-06T5. The New Jersey Supreme Court denied a Petition for Certification on July 3, 2008. State v. Quinn, 196 N.J. 343, 953 A.2d 762 (2008). This Petition for a Writ of Certiorari follows.

COUNTER STATEMENT OF FACTS

On March 3, 2006, at approximately 12:11 a.m., Officer Keith Soules[2], a twelve-year veteran of the Butler Police Department, was on patrol in an unmarked unit on Route 23 North in Butler, New Jersey. (1T13:7 to 1T14:20). He observed a white Mazda vehicle. His attention was drawn to the vehicle because the driver threw something out of the sunroof. (1T16: 2-5). Officer Soules followed the vehicle for about three quarters of a mile. (1T17:13-19). During that time, he observed the vehicle crossing over the dotted white lines in the road over ten (10) times. He also observed

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[2] The trial transcript refers to Officer Soules, phonetically, as Officer 'Zulis'.

the vehicle switch lanes without signaling. (1T18:16-22; 1T19:16-22; 1T20:19-23). The officer was concerned that the driver of the vehicle was possibly intoxicated. (1T20: 2-5).

Officer Soules pulled up alongside of the vehicle and observed that the driver was not wearing a seatbelt. (1T21: 13-20). He executed a motor vehicle stop. (1T22:14-24). As the vehicle pulled to the side of the road, the officer observed it again crossing over the dotted and solid white lines. (1T23: 2-8).

Officer Soules exited his patrol car and approached the driver. He detected a strong odor of alcohol on the driver's breath. (1T24:5-9). He also observed that the driver had a hard time speaking and was slurring and stuttering. (1T24:22 to 1T25:3). The driver was later identified as Sean Quinn (hereinafter 'defendant'). (1T26:8-11).

Officer Soules asked defendant for his credentials. Defendant had a hard time locating his driving credentials. (1T25:17-20). After further observing the defendant's eyes to be bloodshot, and still noting a strong

odor of alcohol on his breath, Officer Soules determined that defendant had been drinking. (1T27: 6-10). Officer Soules testified that he asked defendant if he had been drinking. Defendant replied that he had not. (1T27: 11-17).

A short time later, Sgt. Chimento[3] of the Butler police department, arrived. (1T27: 18-19). In Officer Soules' presence, Sgt. Chimento asked defendant to exit his vehicle. Defendant did so by grabbing onto the door and roof of his car for support. (1T29:3-8). Sgt. Chimento asked defendant to perform some field sobriety tests. The first test Sgt. Chimento asked defendant to perform was the HGN test[4]. (1T31: 14 to T32: 7). Officer Soules was present and observed defendant perform this test. (1T32:

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[3] Sgt. Chimento's testimony was stricken due to a sequestration violation. (2T69:24 to 2T71:8). At the trial de novo, the State relied solely on the testimony of Officer Soules. (3T6:13 to 3T7:4).

[4] Horizontal Gaze Nystagmus test. Under New Jersey law HGN results are not admissible. State v. Doriguzzi, 334 N.J.Super. 530, 760 A.2d 336 (App. Div. 2000).

4-10). During the HGN test, Officer Soules observed defendant to be having a "hard time, swaying back and forth, he was moving in circles. He kept reaching to grab for something for support." (1T36:3-5).

The next test administered by Sgt. Chimento was the alphabet test. Officer Soules observed that defendant had a hard time speaking during the alphabet test and that he stopped a couple of times. (1T32: 11-19). He testified that he observed defendant stop at the letters 'P' and 'W' and that he was stuttering and slurring the whole time. (1T34:9-15). Officer Soules then indicated that the defendant was having a hard time standing. The sobriety tests were discontinued for defendant's safety. (1T35:20-24).

Defendant was subsequently arrested, informed of his Miranda[5] rights and transported back to headquarters. (1T36:6-9). Once at headquarters, defendant admitted he had been drinking alcohol. He

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[5] Miranda v. Arizona, 384 U.S. 436 (1966).

told Officer Soules he had just returned from a business trip and had been drinking on the plane. (1T38:7-14). During this conversation, the defendant was stuttering and slurring his words. He became antagonistic, and called the officers pejorative names. (1T39:4-7; 1T40: 18-20). He also had a "hard time" every time he stood up and had difficulty following orders. (1T40: 14-17).

Officer Soules ultimately testified that in his opinion, defendant was "very intoxicated", and that his intoxication interfered with his ability to operate a motor vehicle. (1T43: 8-16).

REASONS FOR DENYING THE PETITION

I.

DUE PROCESS DOES NOT REQUIRE THE VIDEOTAPING OF FIELD SOBRIETY TESTS ON MOTOR VEHICLE OFFENSES.

Defendant argues that the field sobriety tests and/or evidence of defendant's behavior should be stricken from the record because they were not videotaped. Defendant claims this is a violation of his Fourteenth Amendment right to due process. The State disagrees as there is no federal due process requirement to videotape field sobriety tests.

The federal courts intervene only to correct wrongs of federal constitutional dimension. Dickerson v. United States, 530 U.S. 428, 438-439 (2000). This is not the case here.

There is no absolute duty to retain and preserve all items that might be of conceivable evidentiary value. Arizona v.

Youngblood, 488 U.S. 51, 58 (1988). Whatever duty the Constitution imposes on the states to preserve evidence is limited to material items. California v. Trombetta, 467 U.S. 479, 488 (1984). The failure to preserve potentially useful evidence violates due process only if the accused shows the police acted in bad faith. Youngblood, 488 U.S. at 56. This requires that the exculpatory value of the evidence be apparent and that the police know of it before they destroy an item. Id., at 56 fn.

This court has held that due process does not require that the police create evidence through the use of any particular investigative technique. Youngblood, 488 U.S. at 58-59 . Unless the defendant can show bad faith on the part of law enforcement, "the failure to preserve potentially useful evidence does not constitute a denial of due process of law". Id. at 58.

New Jersey courts have followed this court's precedent regarding the extent that

due process requires the preservation of evidence. For example, although New Jersey may require the recordation of evidence in some instances as a matter of State law, there is no due process requirement to create evidence. State v. Delgado, 188 N.J. 48, 63 , 902 A.2d 888, 896 (2006).

At the State level, the very issue Petitioner raises, was rejected by State v. Gordon, 261 N.J.Super. 464, 619 A.2d 259 (App. Div. 1993). In Gordon, the Randolph, N.J. police department had discontinued their previous practice of videotaping suspected drunk drivers. Defendant argued that this violated his right to due process. The Court disagreed. The Court held that the discontinued practice did not violate defendant's right to due process and that the police, acting in good faith, had no duty to create evidence by videotaping suspected drunk drivers. Id. at 464-465.

Every state court to consider the issue has rejected the premise that due process requires the police to record field sobriety

tests. *See e.g.*, Greene v. Com., 244 S.W.3d. 128, 131 (Ky. App. 2008); Swanson v. Juneau, 784 P.2d. 678, 680-681 (Alaska App. 1989); State v. Powers, 555 So.2d. 888, 890-892 (Fla. App. 2 Dist. 1990), *review denied* 563 So.2d 633 (1990); State v. Havatone, 159 Ariz. 597, 600, 769 P.2d. 1043, 1046 (Ariz. App. 1989); State v. Lyons, 812 S.W.2d. 336 (Tex. Ct. Crim. App. 1991).

Here, Officer Soules was able to testify as to his own observations of defendant's tests and behaviors. A videotape is "merely a mechanical reproduction of the observations made by the individuals who witnessed the actions of defendant at the time of videotaping..." State v. Nemesh, 228 N.J. Super. 597, 550 A.2d 757 (App. Div. 1988), certif. den., 114 N.J. 473 (1989).

The defendant has failed to show that the failure of the police to videotape him was caused by bad faith or that he was prejudiced by the lack of a videotape. Therefore, even if a video were required as a matter of State

evidentiary law, the defendant would not be entitled to relief under Youngblood.

Defendant's reliance on state law precedent is misplaced. Those cases pertain to custodial interrogations, and were decided on independent State law grounds. Stephan v. State, 711 P.2d 1156 (Alaska 1985); State v. Scales, 518 N.W.2d 587 (Minn. 1994); State v. Cook, 179 N.J. 533, 562, 847 A.2d 530, 546 (2004).

No special reasons exist for certiorari. The instant decision is not reported. It does not conflict with any decision from this Court. The issues here are fact specific, and are not of such a far-reaching nature that this Court should become involved.

Petitioner's allegations of due process violations are, in essence, an entreaty to this Court to re-visit and to reverse factual determinations made by the state courts. As such, no further review is warranted.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully submits that defendant's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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MORRIS COUNTY
PROSECUTOR

December 19, 2008

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